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Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1995

NEW HAMPSHIRE MOTOR TRANSPORT, *et al.*,

Petitioners,

vs.

TOWN OF PLAISTOW,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Surface Transportation Assistance Act does not preempt the Town of Plaistow from enforcing a zoning ordinance in a manner which retains reasonable access to a trucking facility, and that because the Town maintained reasonable access, it is unnecessary to determine whether access was restricted for safety reasons.

2. Whether the court of appeals correctly held that the Town of Plaistow can enforce a zoning ordinance so as to limit nighttime access to a trucking facility, and that the enforcement is not preempted by the Hazardous Materials Transportation Uniform Safety Act because it does not cause unnecessary delay in the movement of hazardous materials.

3. Whether the court of appeals correctly held that the Town of Plaistow can enforce a zoning ordinance so as to limit nighttime access to a trucking facility, and that the enforcement does not unduly burden interstate commerce.

4. Whether the court of appeals correctly held that the Town of Plaistow can enforce a zoning ordinance so as to limit nighttime access to a trucking facility, and that the enforcement is not preempted by the Noise Control Act because primary responsibility for control of noise rests with state and local governments.

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Pursuant to its duty under the Supreme Court rules, the Respondent hereby sets forth those Constitutional provisions, statutes and regulations which were incorrectly or incompletely set forth in the Petition. Italics indicate language erroneously cited in or omitted from the Petition.

1. Regulations set forth in 23 C.F.R. § 658.19 provide, in part:

> (a) No State may enact or enforce any law denying reasonable access to vehicles with dimensions authorized by the STAA between the National Network and terminals and facilities for food, fuel, repairs, and rest. In addition, no State may enact or enforce any law denying reasonable access between the National Network and points of loading and unloading to household goods carriers, *motor carriers of passengers*, and any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 feet (28 ½ feet where allowed pursuant to § 658.13(b)(5)) and which generally operates as part of a vehicle combination described in §§ 658.13(b)(5) and 658.15(a).
>
> (b) All States shall make available to commercial motor vehicle operators *information regarding their reasonable* access provisions to and from the National Network.

2. The regulation identified in the Petition as 23 C.F.R. § 658.19(d)(1) should have been identified as (i)(1). The regulation identified in the Petition as (d)(2) should have been identified as (i)(2).

3. The United States Environmental Protection Agency's standards for noise emission enacted pursuant to the Noise Control Act and set forth in 40 C.F.R. § 202.20 provide, in part, as follows:

> (b) No motor carriers subject to these obligations shall operate any motor vehicle of a type to which this regulation is applicable which at any time or under any condition of highway grade, load, acceleration or deceleration generates a sound level in excess of 83 dB(A) measured on an open site with a fast meter response at 50 feet from the center line of lane of travel on highways with speed limits of more than 35 MPH *or less;*....

4. In addition, the Respondent relies on the following provision, which was not included in the Petition.

The Noise Control Act, 42 U.S.C. § 4901(a)(3), provides that:

> [The Congress finds] that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources

in commerce, control of which require national uniformity of treatment.

STATEMENT OF THE CASE

I. Statement of Facts.

In 1987, Atlas Motor Express, Inc. ("Atlas") began planning to relocate its trucking terminal from one location in Plaistow, New Hampshire, to another nearby site. Opinion of the district court ("district court"), Petition at 25a. In furtherance of this goal, Arnold Pevna, the trustee of Olympiad Realty Trust ("Olympiad"), entered into an agreement to purchase a parcel of land located partly in Plaistow and partly in Newton, New Hampshire. *Id.* Atlas intended to operate its trucking terminal on the portion of the property located in Newton. *Id.* Garland Way, a private road through a residential area of Plaistow, provided the only access to the proposed site. District court, Petition at 47a; Decision of the court of appeals ("court of appeals"), Petition at 8a. Garland Way can be accessed only via Kingston Road, a public road. *Id.*

Olympiad asked officials of the Town of Plaistow ("Town") about obtaining necessary approvals for the project. The Town did not have the authority to conduct a site plan review because Olympiad intended to build entirely in Newton. District court, Petition at 47a.

When the owners of abutting property in Plaistow learned of the proposed terminal, they were vehemently opposed to its construction. On November 16, 1987, some of the owners specifically requested that Plaistow and Newton take steps to stop the project.

Newton's planning board held hearings prior to the start of construction. Some of the Town's residents attended a meeting of the Newton planning board and spoke in opposition to the project. The residents expressed concerns about traffic, safety and noise from possible late night operations. Exhibit volume filed with the court of appeals ("exhibit volume") at E23-24. In addition, during the course of Newton's approval process, Mr. Pevna and his attorney, William Barron, made specific representations about the nature of Atlas' intended operations. Those representations included the following: only 17 or 18 trucks would use the terminal; the trucks would leave in the morning and return in the evening to remain overnight at the terminal; the last truck would arrive between 7:00 p.m. and 9:00 p.m.; the operation would not affect the residents and noise would not be a factor. Exhibit volume at E16, E18. The Newton planning board subsequently approved the project.

After the approval, a number of residents who owned property along the portion of Kingston Road south of Garland Way filed an action against Atlas in the New Hampshire Superior Court (Rockingham County). District court, Petition at 26a. The action was eventually settled. *Id.* at 27a. The settlement included an agreement that trucks leaving the terminal via Garland Way would only turn right, not left, onto Kingston Road. While the settlement appeased residents owning property to the south of Garland Way, the settlement necessarily meant that all trucks would be forced to pass by the unfortunate residents owning property along Kingston Road to the north of Garland Way. Moreover, the settlement had no effect on the hours trucks would be entering and exiting the terminal. Exhibit volume at E38.

On September 25, 1988, Atlas commenced operations. Most trucks approaching the terminal exited Interstate 495 in Haverhill, Massachusetts and traveled approximately six (6) miles, primarily on Route 125, a state highway, before reaching Garland Way. Garland Way begins 2,000 feet from the entrance to the terminal. Court of appeals, Petition at 8a. The Haverhill entrance to Route 495 is the closest point of access from the terminal to the Eisenhower System/National Network of Highways. *Id.* Route 125 is not, and has never been, part of the National Network. *Id.*

When the terminal opened in 1988, Atlas did not haul materials defined as hazardous under the Hazardous Materials Transportation Uniform Safety Act ("HMTUSA"). Exhibit volume at E20. In 1992, Atlas received a Hazardous Materials Permit. *Id.* at E82-83. Since that time, no more than half of the trailers entering the Atlas facility have contained hazardous materials. Most of those hazardous materials have been paint thinners and solvents. District court, Petition at 37a.

Due to the ongoing concern of the residents along Garland Way and Kingston Road, the Town served Atlas and Olympiad with a cease and desist order on October 7, 1988, shortly after the terminal opened. The order stated that Atlas was operating in violation of Plaistow Ordinance Article 1, § 1.4. That section provides as follows:

> Any uses that may be obnoxious or injurious by reason of the production or emission of odors, dust, smoke, refuse matter, fumes, noises, vibrations or other similar conditions,

> or that are dangerous to the comfort, piece, enjoyment, health or safety of the community whether it contributes to its disturbance or annoyance are prohibited in all Districts.

District court, Petition at 27a-28a. Atlas' operations violated the ordinance because the trucks entering and exiting the terminal were emitting odors, smoke, fumes, noise and vibration 24 hours each day. Atlas, however, ignored the Town's order and continued operations.

Faced with continuous complaints from residents and Atlas' deliberate choice to ignore the cease and desist order, the Town filed a petition for temporary and permanent injunctive relief in the superior court. *Id.* at 27a-28a. That petition did not take issue with Atlas' daytime operations or the number of trucks traveling on Kingston Road. Rather, it focused on the acceleration and deceleration of the trucks as they entered and exited Garland Way. In particular, the petition complained that a large number of trucks entered and exited the terminal between 7:00 p.m. and 10:00 p.m. Exhibit volume at E40-E44. For example, on one particular day, an owner of abutting residential property counted twenty-two trucks entering or exiting the terminal between those hours. *Id.*

On February 28, 1989, the superior court issued an order finding that the truck traffic on Garland Way unreasonably interfered with the sleep and lives of the residents. The court enjoined Atlas from allowing trucks to enter and exit the facility between 7:30 p.m. and 6:30 a.m. District court, Petition at 28a.

Atlas and other interstate carriers disregarded the order. Trucks continued to enter and exit the terminal 24 hours a day. The Town was forced to request injunctive relief a second time. Subsequently, the superior court issued a second order regarding the use of the terminal:

6:00 a.m. - 9:00 p.m. (15 hours) - unlimited access
9:00 p.m. - 11:00 p.m. (2 hours) - 2 trucks enter/exit
11:00 p.m. - 5:00 a.m. (6 hours) - no trucks enter/exit
5:00 a.m. - 6:00 a.m. (1 hour) - 3 trucks enter/exit.

Exhibit volume at E48-E69.

Atlas also ignored the second order. The Town eventually filed a motion for contempt. Simultaneously admitting non-compliance with the second order, Atlas requested a modification of its terms.

After a hearing, the superior court modified its second order and temporarily eased the restrictions. From March 20, 1992 through March 20, 1993, the modified order set the following parameters:

6:00 a.m. - 9:00 p.m. (15 hours) - unlimited access
9:00 p.m. - 11:00 p.m. (2 hours) - 3 trucks enter/exit
11:00 p.m. - 4:45 a.m. (5 3/4 hours) - no trucks enter/exit
4:45 a.m. - 6:00 a.m. (1 1/4 hours) - 5 trucks enter/exit.

Exhibit volume at E70-E71, E75-E76. The superior court clearly stated that it would make no further modifications and that further violations would result in sanctions for contempt against Atlas. *Id.*

II. Course of Proceedings and Opinions Below.

Petitioners filed this action in the United States District Court for the District of New Hampshire on March 6, 1993, just before the modified order was to revert to its earlier form. The complaint sought to bar the Town from enforcing § 1.4 of its zoning ordinance. Petitioners claimed that the enforcement of the ordinance was preempted by the Surface Transportation Assistance Act, the Hazardous Materials Transportation Uniform Safety Act, the Noise Control Act, and Art. 1, Sec. 8, cl. 3 of the United States Constitution, the Commerce Clause. Petition at 9.

The Town moved to dismiss the action on the basis that the federal statutes and regulations did not preempt the ordinance and that, as enforced, the ordinance did not violate the commerce clause. The court granted the motion to dismiss as to Count III, the claim under the Noise Control Act ("NCA"). *New Hampshire Motor Transport Ass'n v. Town of Plaistow*, 836 F. Supp. 59 (D.N.H. 1993), Petition at 60a-63a.

The court denied the remainder of the motion to dismiss. The court first considered the claim under the Surface Transportation Assistance Act ("STAA"). It stated that a municipality may enforce a local ordinance regulating commercial motor vehicles, including tractor trailers, as long as the enforcement of the ordinance allows "reasonable access" to terminals. If reasonable access is denied, the denial must be based on safety. *Id.* at 51a-56a. The court also held that the enforcement of the ordinance would only be preempted by the HMTUSA if it involved an "unnecessary delay" in the transportation of hazardous

waste. *Id.* at 56a-60a. The court reserved for trial the factual analysis necessary to determine whether the STAA or the HMTUSA preempted enforcement of the ordinance.

The court further held that since the restrictions did not affirmatively discriminate against interstate commerce, the commerce clause would only preempt their enforcement if the burden imposed on interstate commerce was shown to be clearly excessive in relation to the local benefits. The petitioners were given the opportunity at trial to show that the burden on interstate commerce was clearly excessive in relation to the local benefits. *Id.* at 63a-65a.

After a three day bench trial, the court issued an order finding that the Town was not prohibited from enforcing the order in the manner described. *New Hampshire Motor Transport Ass'n v. Town of Plaistow,* 881 F. Supp. 695 (D.N.H. 1994), Petition at 24a-44a.

The Petitioners appealed to the United States Court of Appeals for the First Circuit. The court of appeals affirmed the district court. *New Hampshire Motor Transport Ass'n v. Town of Plaistow,* 67 F.3rd 326 (1st Cir. 1995), Petition at 6a-23a. The court of appeals held that under the STAA, states may place restrictions upon access to a terminal as long as reasonable access is maintained. The court specifically found that where the restrictions retained reasonable access to terminals, safety need not be the only basis for the restrictions. Since the court of appeals concluded that the district court had correctly construed the STAA, it did not disturb the district court's factual finding that the Town had not denied reasonable access to the terminal. *Id.* at 11a-17a.

The court of appeals also found that the HMTUSA did not preempt enforcement of the ordinance. The restrictions did not impose unnecessary delay on the transportation of hazardous materials. *Id.* at 17a-19a.

Turning to the claims under the NCA, the court of appeals further found that enforcement of the ordinance was not preempted because the restrictions did not regulate decibel levels, exhaust systems or tires of individual trucks. Rather, noise levels were merely one element of an equation including "odors, dust, smoke, refuse matter, fumes . . . and vibrations." *Id.* at 19a-21a.

Finally, the court found that the enforcement of the ordinance did not violate the commerce clause. It found that pursuant to a dormant commerce clause analysis, the burden on interstate commerce was not clearly excessive in relation to the local benefits. *Id.* at 21a-23a.

The Petitioners filed a Petition for Rehearing and Rehearing en Banc. On October 25, 1995, the court of appeals issued a strongly-worded decision denying the Petition. *New Hampshire Motor Transport Ass'n v. Town of Plaistow*, 67 F.3d 326 (1st Cir. 1995), Petition at 3a-5a.

ARGUMENT

"A review on writ of certiorari is not a matter of right, but of judicial discretion. A Petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10.1. No "special" or "important" reason exists in this case.

This is a highly fact-specific case. The decisions of both lower courts primarily rested on factual determinations that this Town's particular restrictions on late-night truck traffic through a specific residential area preserved "reasonable access" to the trucking terminal, did not create an "unnecessary delay" in the transportation of any hazardous materials, and did not create an "undue burden on interstate commerce in relation to putative local benefits".[1]

None of the considerations listed in Supreme Court Rule 10 are present in this case. As to each and every question presented for review, the Petition either fails to allege or erroneously alleges that Rule 10 considerations are present. The Petition also fails to allege the existence of any substantial consideration not mentioned in Rule 10. Most importantly, the Petition does not suggest that any of the issues presented should be reviewed by the Court because they are of general importance to the nation.

Moreover, the court of appeals correctly decided this case. This dispute has been examined by no less than five state and federal courts, all with the same result. Each of those courts, including the court of appeals, properly sustained the Town's right to impose reasonable, limited restrictions on late-night truck traffic in a residential neighborhood in order to protect the health, safety and

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[1]The ruling of the court of appeals regarding the NCA, however, rested solely on an implied preemption analysis. The Petitioners disagree with the outcome of the court's analysis under the NCA. *See* Argument, *infra*, Section III.

welfare of Town residents. For these reasons, as more specifically set forth below, the Petition should be denied.

I. The Surface Transportation Assistance Act

A. The Decision Below Does Not Create A Conflict Among the Circuits.

In spite of an otherwise unsupported statement to the contrary in the Petitioners' Conclusion, the decision below does not create a conflict between circuits with respect to the STAA. Any statement to that effect is simply incorrect. In fact, no other circuit court of appeals has interpreted the express preemption provision of the STAA. For this reason, certiorari should be denied.

The Court may find it important that the Third Circuit has never addressed the preemption provision of the STAA, even though *Consolidated Freightways Corp. v. Larson*, 647 F. Supp. 1479 (M.D. Pa. 1986), *rev'd*, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988), has a subsequent appellate history. The circuit court's review was limited to issues regarding a late-filed appeal. *See* Brief for Plaintiffs-Appellants at 15, n.9. Similarly, another case cited by the Petitioners, *New York State Motor Truck Assoc., Inc. v. City of New York*, 654 F. Supp. 1521 (S.D.N.Y. 1987), *aff'd*, 933 F.2d 430 (2d Cir. 1987), has an appellate history. The circuit court's review in that case was also unrelated to the STAA. Accordingly, in both cases, the district court was the highest tribunal to interpret the STAA.

B. The Decision Below Does Not Conflict With Decisions of Other District Courts.

The Petitioners' primary argument is that the interpretation of the STAA's express preemption provision conflicts with decisions of district courts in other circuits on the same issue. To the contrary, a careful reading of the cases cited in the Petition shows that a direct conflict does not exist.

In determining that the STAA does not preempt the Town from limiting late-night truck traffic through a residential neighborhood, the court of appeals engaged in a straightforward statutory construction analysis. The express preemption provision of the STAA has two parts. The first part, § 31114(a), prohibits states from denying commercial motor vehicles "reasonable access" between the national network of highways and terminals. The second part, § 31114(b), is an exception to the first provision. The exception discusses restricted access to pup-trailers based on safety considerations.

The court of appeals found that, both as a matter of statutory construction and of common sense, as long as a local regulation maintained "reasonable access" between the national network and a terminal, section (b) of the preemption provision would not apply. In deciding that access could be restricted for reasons other than safety, the court of appeals stated that, "'[r]easonable' [in section (a)] is a comprehensive term. . . and nothing in the language or common-sense makes reasonableness turn solely on safety considerations. Context reenforces this view." In addition, the court found nothing in the statute or in the legislative history evidencing a clear intent of Congress to preclude

access restrictions based on considerations other than safety. "Safety is obviously a paramount reason for limiting access; but, in our view, it is not the only reason permitted by Congress." Accordingly, the court held that as long as a local regulation preserves "reasonable access" to a terminal, the regulation need not be based on safety concerns, and the STAA would not preempt the regulation.

Each case cited in the Petition can be read consistently with the decision of the court of appeals. For example, Petitioners have misinterpreted the holding of *Larson*, 647 F. Supp. 1479. Although the *Larson* court invalidated Pennsylvania's blanket restrictions on access to certain terminals, it did so consistently with the analysis of the court of appeals in this case. The *Larson* court found that Pennsylvania restrictions: (1) were not reasonable; and (2) were not based on safety. Accordingly, *Larson* involved a situation which is not present in this case, i.e. one in which "reasonable access" under section (a) had been denied. *Larson* is not inconsistent with the analysis in this case precisely because the *Larson* court did not hold that safety could be the only basis for restricting access. This finding can be read consistently with the court of appeals' holding that the preemption analysis turns to section (b) and the question of "safety considerations" only where the denial of access is not reasonable. The mere fact that *Larson* did not explicitly state that section (b) must be read separately from section (a) does not render it inconsistent with the analysis of the present case.

Petitioners have also misinterpreted the holding of *New York State Motor Truck Ass'n*, 654 F. Supp. 1521. The facts at issue in that case were similar to those in *Larson*. The restrictions at issue also did not preserve

"reasonable access" under section (a). Accordingly, since reasonable access had been denied, the district court went on to find that, under part (b), permissible restrictions could be based only on safety considerations. This holding is not inconsistent with the decision in the present case. Since the Town allows reasonable access to the terminal, the court of appeals did not need to engage in an analysis under section (b).

The Petitioners have also misinterpreted the holding of *ABF Freight System, Inc. v. Suthard,* 681 F. Supp. 334 (E.D. Va. 1988). In that case, yet another district court examined the preemption provisions of the STAA. *Suthard* is similar to both *Larson* and *N.Y. Motor Truck Ass'n* in that the state regulation at issue did not provide reasonable access to terminals. Therefore, the *Suthard* court engaged in an analysis under section (b) and determined that the denial of reasonable access could be based only on safety considerations. Ultimately, the *Suthard* court found that the denial of reasonable access had not been based on safety considerations as required by section (b), and that therefore, the state regulation was preempted.

Accordingly, none of the cases cited by the Petitioners creates a conflict with the decision below. In each of those cases, the local restrictions operated to deny reasonable access to terminals. The discussion in those cases focused on the second part of the preemption analysis, which is not operative in this case because reasonable access has been preserved. Accordingly, the decisions cited by the Petitioner can be read consistently with the decision below. No conflict exists between the court of appeals and the opinions of other district courts. For this additional reason, certiorari should be denied.

C. Even If The Decision Below Conflicts With Decisions of District Courts, Review By This Court Is Not Warranted.

Even assuming that the Petitioners are correct in their assertion that the decision below conflicts with prior decisions, certiorari review is not warranted:

> The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit. The Court tries to achieve uniformity in federal matters only among the various courts whose decisions are otherwise final in the absence of a Supreme Court review -- the courts of appeals, other federal courts of the same stature, and the highest state courts in which a decision may be had. It is the duty of the courts of appeals to maintain uniformity within their respective circuits and to supervise the decisions of various district courts.

Robert L. Stern, et al., Supreme Court Practice 178-79 (7th ed. 1993).

This general principle applies in the present case. It may be that other circuit courts, given the opportunity, would interpret the STAA preemption provisions in accordance with the first circuit's thorough and well-reasoned interpretation. Until other circuit courts tackle

this issue, it is impossible to discern what shape the general body of law regarding the STAA will take. Accordingly, even if a conflict exists between the court of appeals and a district court, the Petitioners' request for certiorari review is premature. In the absence of any interpretation of the STAA from a court of the same stature as the court of appeals, review by this Court is unnecessary.

Moreover, even in situations in which this Court has noted that a decision of an appellate court conflicted with a decision of a district court, the Court has done so "without suggesting that such a conflict alone would justify the granting of certiorari." *Id.* at 179 (citing *United States v. Constantine*, 296 U.S. 287, 290 (1935). "At most, this type of conflict has been recognized as a factor tending to reinforce some other and more substantial basis for review, such as the importance of the question involved and the confusing and differing judicial responses to that question." *Id.*

In the present case, no "other and more substantial basis for review" has been alleged, nor does any such basis exist. The Petitioners have not argued that there is a question of national importance involved in the outcome of this case. Moreover, due to its fact-intensive nature, this case does not hold national import. In addition, aside from this case, no circuits and only a very few district courts have discussed "reasonable access" under the STAA. The sheer paucity of case law shows that this is not an issue of national importance. Since very few cases have interpreted the STAA, neither can the Petitioners claim there are a number of "confusing and differing judicial responses" to the STAA's preemption provision. For these additional

reasons, this is not an appropriate case for review on a writ of certiorari.

D. The Court of Appeals Correctly Determined that the STAA Does Not Preempt the Town From Imposing Reasonable Late-Night Restrictions on Truck Traffic Through A Residential Area.

The court of appeals determined that it had "no occasion to review the [district] court's further, fact-specific decision that the Plaistow restrictions in this case did permit reasonable access." The Petitioners had "scarcely bothered to argue the point; in a couple of sentences, they simply assert[ed] that the district court findings show that a truck terminal must operate 24 hours a day. The [district court] opinion does not make such a finding and we think appellants' cursory argument waives the factual issue in this case." Since the Petitioners waived any argument they may have had regarding the factual determination that "reasonable access" was being provided by the Town, they are not entitled to further review of the issue. Accordingly, the argument that the court of appeals erred in not reviewing the district court's factual finding that reasonable access had been provided is without merit.

In any event, the court of appeals correctly decided not to review the district court's factual determination that reasonable access to the terminal had been preserved. As set forth in the Statement of Facts, *supra*, the Town presented ample evidence at trial to show that its enforcement of the zoning ordinance was reasonable. For example, the Town restricts traffic only during 9 out of 24 hours. In addition, the district court found that the

restrictions are knowable to truckers in advance of their arrival at the terminal. Even during night-time hours, the Town's restrictions do not shut down the terminal and in no way prevent trucks already at the terminal from loading, unloading, and otherwise conducting their business.

In support of its argument that the court of appeals was correct, the Respondent takes this opportunity to fulfill its obligation to address several perceived misstatements in the Petition regarding this issue. The Petition incorrectly states, "it is also clear from the record that Plaistow's restrictions are in no way based upon safety but relate solely to disturbance suffered by Plaistow residents who live near the terminal's egress. . . ." Petition at 18. This is a mischaracterization of the record. No court has ever ruled that the restrictions were not related to safety. Moreover, the Town presented evidence at trial that enforcement of the zoning ordinance was related to safety, in addition to other considerations. Appendix filed with court of appeals at A102-103, 106; Transcript volume filed with court of appeals at 147-48, 304-307, 339, 357, 360, 403-404. In addition, the zoning ordinance expressly includes "safety" of the community as a concern.

The Petition also states, "Section 1.4 of the Plaistow zoning ordinance as enforced. . .prevents interstate trucks from entering or exiting a terminal located in the adjacent municipality of Newton." Petition at 18. This statement is misleading to the extent that it implies that all traffic to and from the terminal is prohibited. To the contrary, the ordinance, as enforced, only reasonably restricts late-night truck traffic on one residential street located in Plaistow.

Finally, the Petition states that the Town "declined to assert jurisdiction over the construction of the terminal because it was located wholly within the Town of Newton with access through a private drive in Plaistow." Petition at 18. As mentioned in the Statement of Facts, *supra*, although the Town did not assert jurisdiction over the construction of the terminal, this was not because the Town "declined" to do so. The Town could not assert jurisdiction over a construction site in an adjacent town. Even if it had wanted to do so, the Town lacked that authority. To the extent that the statement implies that the Town waived its ability to regulate truck traffic through residential areas within its borders, the statement is groundless.

More importantly, however, to the extent that the same statement and similar statements throughout the Petition imply that the Petitioners were somehow "blindsided" by the Town because the Town waited until the terminal was operational to enforce the zoning ordinance, the statements are disingenuous. The record below provides ample evidence that Town residents were concerned and proactive with respect to the construction of the terminal from the outset. The record below also shows that Petitioners made inaccurate representations regarding operations at the terminal. If anyone was surprised when the terminal began 24 hour operations, it was the residents. Accordingly, to the extent that the Petition suggests that the Petitioners were unfairly treated by the Town, this is inaccurate. For all these reasons, certiorari should be denied.

II. The Hazardous Materials Transportation Uniform Safety Act

A. The Decision Below Does Not Raise Any Issues Which Warrant Review.

With respect to the HMTUSA, the Petition fails to argue that any of the considerations listed in Supreme Court Rule 10 exist in the present case. The Petitioners have not argued, because they cannot argue, that any of those "special" and "important" considerations are at work. For example, the decision of the court of appeals does not conflict with decisions of any other court. Rather, it is entirely consistent with previous decisions of the first circuit, *New Hampshire Transport Ass'n. v. Flynn*, 751 F.2d 43 (1st Cir. 1984), with decisions of other circuits, *Nat'l Tank Truck Carriers v. City of New York*, 577 F.2d 270 (2d Cir. 1982), with decisions of district courts within the first circuit, *Nat'l Tank Truck Carriers v. Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1983) (applying same legal analysis, but reaching different result based factual distinctions), and with decisions of district courts in other circuits, *Missouri Pacific R.R. v. R.R. Comm'n of Texas*, 671 F. Supp. 466, 480 (W.D. Tex. 1987)(applying same legal analysis, but reaching different result based on factual distinctions), *aff'd on other grounds*, 488 U.S. 1009 (1989). Moreover, the Petitioners do not attempt to articulate an argument that this case presents an important issue under the HMTUSA which ought to be decided by this Court. This case does not present such an issue.

The only basis asserted by the Petitioners in support of their request for review seems to be that they did not

agree with the decision below. Although the Petition states that the decision below "conflicts with federal case law and statutory and regulatory provisions regarding the Act," the only case the Petitioners cite in support of this argument is another case from within the first circuit, *Burke*, 535 F. Supp. 509. Even assuming that *Burke* conflicts with the present case, it is the obligation of the circuit to supervise its various districts and to maintain uniformity within itself. *Stern*, *supra*, at 178-79. Accordingly, with respect to the HMTUSA, the Petition should be denied.

B. The Court of Appeals Correctly Determined that the HMTUSA Does Not Preempt the Town's Restrictions.

As the court of appeals noted, the HMTUSA establishes uniform national rules for transportation of hazardous materials. These rules touch upon subjects such as packaging, labeling and handling of hazardous materials. The statute contains an express preemption clause. Corresponding regulations mandate that hazardous materials must be transported without "unnecessary delay". 49 C.F.R. § 177.853(a). The court of appeals also noted that the words "unnecessary delay" indicate that some delays are necessary and acceptable. The Petitioners had the burden to show that the Town's restrictions created "unnecessary delay". They made "little effort to show that on the present record the specific curfew requirements imposed by Plaistow create any risk to the drivers of the trucks, other highway traffic, Plaistow or any other community. . . . At least on this appeal, [Petitioners] have not even attempted a serious fact-specific showing." The Petitioners waived any factual argument that the Town's restrictions created "unnecessary delay." Since they failed to raise this issue

adequately before the court of appeals, they are not entitled to further review.

Moreover, the court of appeals correctly affirmed the decision of the district court. In ruling that the restrictions did not cause "unnecessary delay," the court of appeals considered the following facts: the restrictions only affect one terminal; the restrictions are tailored to specific local conditions; and the restrictions do not impose time limitations on the delivery of hazardous materials in New Hampshire, so long as this terminal is not used as a point of interchange. For this additional reason, the HMTUSA does not preempt the Town's restrictions. Accordingly, certiorari is not warranted on this issue.

III. The Noise Control Act

A. The Decision Below Does Not Raise Any Issues Which Warrant Review.

With regard to the NCA, the Petitioners have failed to specifically articulate any reason, listed in Rule 10 or elsewhere, as to why this Court should review this case. The Petition does not discuss any "special" or "important" reason in support of its request. The Petition does not allege a conflict with any other court. Indeed, only a very small number of cases have addressed the NCA. None of those decisions conflict with the legal analysis of the court of appeals. *See, e.g., Baltimore and Ohio R.R. Co. v. Oberly,* 837 F.2d 108 (3d Cir. 1988).

B. The Court of Appeals Correctly Determined that the NCA Does Not Preempt the Town's Restrictions.

Moreover, the court of appeals correctly upheld the district court's 12(b)(6) dismissal of the preemption claim under the NCA. As the decision below notes, the NCA does nothing more than set minimum and maximum decibel levels for trucking equipment that may operate on public roadways. 40 C.F.R. §§ 202.20. The statute's express preemption provision merely prevents localities from setting different decibel levels for motor carriers within its jurisdiction. 42 U.S.C. § 4917 (c)(1). By enacting the NCA, Congress did not intend to preempt every local attempt to regulate noise. By its own terms, the NCA's preemptive effect is extremely limited: "primary responsibility for control of noise rests with State and local governments. . . ." 42 U.S.C. § 4901(a)(3). As the court of appeals aptly stated, "it would stretch the words [of the preemption provision] beyond their ordinary meaning to strike down a local curfew order based on a range of concerns where federal law regulates only the decibel levels of the equipment." The NCA does not preempt the Town's regulation of night-time truck traffic in a residential neighborhood, where such regulation does not attempt to impose maximum decibel levels on such traffic.

In addition, the court of appeals' preemption analysis is supported by the third circuit's analysis of the NCA in *Baltimore and Ohio R.R. Co. v. Oberly*, 837 F.2d 108. That case discussed the preemptive effect of analogous NCA regulations on interstate rail carriers. *Oberly* stated:

> Section 17(c)(1) simply is not a global preemption provision. To the contrary, it provides only that each federal noise regulation, once enacted, bars direct states regulations of noise emissions. . . . [I]t in no way suggests that Congress meant for the adoption of any federal noise regulation to bar or displace every state effort to regulate the noise emissions.

Id. at 114 (emphasis in original). As in *Oberly*, the court of appeals in this case properly decided that the Petitioners' claim under the NCA could not succeed. Accordingly, the Petition should be denied.

V. The Commerce Clause

A. The Decision Below Does Not Raise Any Issues Which Warrant Review.

With respect to the commerce clause, the Petitioners have failed to specifically articulate any reason why this Court should review the decision below. The Petitioners have not argued that a single Rule 10 consideration is present in this case. Nor have the Petitioners alleged any other recognized basis for review by this Court. In essence, the Petitioners merely complain that the court of appeals decided a factual issue in a manner adverse to their interests.

B. The Court of Appeals Correctly Determined that the Commerce Clause Does Not Preempt the Town's Restrictions.

In any event, the court of appeals applied the correct commerce clause analysis in a manner consistent with the previous decisions of this Court. This case involves an incidental burden on interstate commerce. *Maine v. Taylor, 477 U.S. 131 (1986).* The court of appeals properly applied a "dormant" commerce clause analysis. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). According to prior decisions of this Court, the dormant commerce clause analysis requires a determination of whether the burden imposed on commerce is clearly excessive in relation to the local putative benefits. *Id.* at 142. The court of appeals properly insisted on a "fairly clear showing of undue burden before holding unconstitutional a traditional example of local regulation." *Raymond Motor Transport. Inc. v. Rice*, 434 U.S. 429 (1978).

The Petitioners failed to make such a showing in this case. The court of appeals examined at length the facts relevant to this analysis. It determined that in this case, the "burden of the curfew on interstate commerce has not been shown to be excessive in relation to the benefits." The crux of the Petitioners' argument is that the court of appeals erroneously decided this factual issue. This argument, however, is insufficient to warrant review. Generally, this Court does not grant certiorari to review the factual determinations of lower courts, particularly where the findings of fact made by the district court receive the concurrence of the court of appeals, as is the situation in

the present case. *Stern, supra,* at 189. For this additional reason, certiorari should not be granted in this case.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that this Court deny the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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